

THE PANEL PROCESS: LESSONS FROM EXPERIENCE

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INTRODUCTION

I will start with a brief overview of my relatively positive assessment of the overall operation of the WTO dispute settlement system in terms of resolving disputes (i.e., results of consultations and formal panel/Appellate Body proceedings), based on the apparent satisfaction of the parties with the results in individual cases (cf. DSU, art. 3.7, 2d & 3d sentences).¹

Since my experience comes from advising panels and serving as a panelist, I will limit my comments to panel-related issues. Of those issues, I will focus on (i) improving panel selection procedures and (ii) reducing the time taken by the panel process. As to the other issues assigned to this session, I would offer the following comments:

On the issue of **preliminary rulings**, panels do make them where necessary on a regular basis. I would not attempt to promote an expansion in the current use of preliminary rulings unless a Standing Panel Body is created. In the absence of such a body, increasing the number of such rulings would lead to significant delays, particularly in cases with first-time panelists or panelists who are not acquainted with each other.

On the issue of **evidence and experts**, I think that current practices in respect of using experts at the panel level have worked satisfactorily, even though those practices developed in a way not foreseen in the DSU. Panels routinely adopt rules on the timing of evidentiary submissions and for confidential business information (CBI). While some more detailed rules would be useful, most international tribunals do not have, and presumably feel that they do not need, rules comparable to the US federal rules of evidence. In any event, action on more detailed evidence rules will be difficult absent the creation of a Standing Panel Body. On CBI, I would note that the Appellate Body's belief, as expressed in the Brazil-Canada regional aircraft dispute, that special rules are not needed (because "confidential means confidential") was naïve and will have to be revisited, perhaps on the appeal of the Airbus-Boeing dispute.

On openness and amicus briefs, I favor both.

¹ William J. Davey, "The WTO Dispute Settlement System: The First Decade", 8 *Journal of International Economic Law* 17-50 (2005); William J. Davey, "Evaluating WTO Dispute Settlement: What Results have been Achieved Through Consultations and Implementation of Panel Reports?", Illinois Public Law Research Paper No. 05-19, <http://ssrn.com/abstract=863865>, posted November 30, 2005.

I. *PANELIST SELECTION*²

A. *Current practice*

1. *Background of panelists* – 1995-2000 – 84% governmental
- 2002-2006 – 78% governmental
2. *Country of origin* – 1995-2000 (top five: Switzerland, New Zealand, Australia, Brazil, South Africa); 2002-2006 (top five: New Zealand, Australia, South Africa, India, Uruguay)
3. *Prior WTO/GATT dispute settlement experience* – two of three panelists (1995-2000 – 45%; 2001-2005 – 78%)
4. *Time taken to compose* – 2003-2006 – 53 days
5. *Appointment by the Director-General* – 2003-2006 – 79%
6. *Conclusion*

B. *Reforms*

1. *Standing Panel Body*

- a. Practical operation – structure; resource requirements; need for separate secretariat support; etc.
- b. Advantages – better able to deal with ancillary proceedings (e.g., preliminary matters, remands, compliance proceedings); better decisions through greater experience; more standardized practices better ensured; much faster panel selection; more efficient scheduling of meetings and deliberations; will be viewed as more independent, etc.
- c. Disadvantages – potential loss of expertise; demographic shift (NZ, Australia, Switzerland, South Africa to EU, US); experience shift (fewer governmental; more retirees/academics?); inevitable political-based appointees will result in lower quality reports; cost; etc.

2. *Improved Indicative List*

Same potential advantages compared to those of Panel Body, but much more limited in scope; similar potential disadvantages, except for cost

3. *Conclusion*

² For more detail, see William J. Davey, “A Permanent Panel Body for WTO Dispute Settlement: Desirable or Practical?”, in Daniel L.M. Kennedy & James D. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honor of Professor Robert E. Hudec* 496-527 (Cambridge University Press 2002); “Introduction” & “The Case for a WTO Permanent Panel Body”, 6 *Journal of International Economic Law*, no. 1 (2003), along with eight other views.

II. TIME FRAMES

A. Current performance

1. Panel establishment to report circulation – DSU target: 9 months
Actual performance:
1996-1999 11 months/2 days
2000-2002 12 months/6 days
2003-2006 13 months/27 days [50% over target]
2. Do delays matter?
 - a. Discourage business interest in asking governments to use system – along with inadequate remedies
 - b. Undermine perceptions of system’s effectiveness
3. Do governments care?
 - a. Yes, in the abstract
 - b. Not so much in specific cases (want more time to file, etc.)

B. Possible changes to improve time performance

1. Eliminate second DSB meeting required to establish panel – always required, but serves no useful purpose
2. Use Panel Body to compose panels (see point I above)
3. Require complainant to file first submission in 4 weeks and permit respondent to file first submission 4 weeks thereafter
4. Eliminate interim review – serves no useful purpose; only one significant change in eleven years; duplicates appeals
5. Provide 30 day limit to appeal or adopt panel reports – losing party has plenty of time to decide what to do, even without interim review

C. Impact of Proposed Changes

<i>Item</i>	<i>Recent median times</i>	<i>Time savings</i>
1. Second DSB meeting	31 days	31 days
2. Composition (Panel Body)	53 days	50 days
3. Submissions [per App. 3]	63 days	7 days
Panel scheduling (Panel Body)		14 days
4. Interim review	42 days	42 days
5. Adoption/appeal	40 days	10 days
Total		154 days/5 months
Total (without Panel Body)		90 days/3 months

These changes would mean that panel establishment to report adoption or appeal would be completed within 9 months – without reducing panel deliberation time or the period devoted to preparing submissions and meetings (except for the 2 week scheduling savings from a Panel Body). The latter period median has recently (2003-2006) been 152 days – compared to a DSU target of 112 days, so additional savings might be achieved by more closely following the suggested briefing/meeting schedule in Appendix 3.

CONCLUSION